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State v. Eversole Appellant's Reply Brief Dckt. 41063

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 41063
)	
v.)	BINGHAM CO. NO. CR 2011-3216
)	
BRANT LEE EVERSOLE,)	REPLY BRIEF
)	
Defendant-Appellant.)	
_____)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BINGHAM

HONORABLE DARREN B. SIMPSON
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

JUSTIN M. CURTIS
Deputy State Appellate Public Defender
I.S.B. #6406
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Brant Lee Eversole appeals from his judgment of conviction for driving under the influence of alcohol. Mr. Eversole pleaded guilty but preserved the right to appeal from the denial of his pre-trial motions. This Court suspended the appeal pending the outcome of *State v. Halseth*, __ Idaho __, 339 P.3d 368 (2014). Mr. Eversole asserts that *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), *Missouri v. McNeely*, 569 U.S. __, 133 S. Ct. 1552, 1558 (2013), *State v. Wulff*, 157 Idaho 416 (2014), and *Halseth* require that the order denying his motion to suppress be reversed.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Eversole's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Did the district court err when it denied Mr. Eversole's motion to suppress?
2. Did the district court err when it denied Mr. Eversole's motion to dismiss?

ARGUMENT

I.

The District Court Erred By Denying Mr. Eversole's Motion To Suppress

A. Introduction

Mr. Eversole asserts that *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552, 1558 (2013), *State v. Wulff*, 157 Idaho 416 (2014), and *State v. Halseth*, ___ Idaho ___, 339 P.3d 368 (2014), require that the order denying his motion to suppress be reversed.

B. The District Court Erred By Denying Mr. Eversole's Motion To Suppress

In the Appellant's Brief, Mr. Eversole argued that, because implied consent is not a valid exception to the warrant requirement because it is a *per se* exception. (Appellant's Brief, pp.12-16.) The Idaho Supreme Court has recently agreed that implied consent is a *per se* rule and, therefore, not a valid exception to the warrant requirement. See *State v. Wulff*, 157 Idaho 416, ___, 337 P.3d 575, 582 (2014). The Court concluded:

Because *McNeely* prohibits per se exceptions to the warrant requirement and the district court correctly understood Idaho's implied consent statute operated as a per se exception, Idaho's implied consent statute does not fall under the consent exception to the Fourth Amendment of the United States Constitution. Thus, we overrule *Diaz* and [*State v.*] *Woolery*[, 116 Idaho 368 (1989)] to the extent that they applied Idaho's implied consent statute as an irrevocable per se rule that constitutionally allowed forced warrantless blood draws.

Id. Further, "irrevocable implied consent operates as a per se rule that cannot fit under the consent exception because it does not always analyze the voluntariness of that consent. Voluntariness has always been analyzed under the totality of the

circumstances approach: 'whether a consent to a search was in fact 'voluntary' ... is a question of fact to be determined from the totality of all the circumstances.'" *Id.*, 157 Idaho at ___, 337 P.3d at 581 (citing *Schneckloth*, 412 U.S. at 227.)

Similarly, in *Halseth*, the Idaho Supreme Court clearly held that, "an implied consent statute such as Washington's and Idaho's does not justify a warrantless blood draw from a driver who refuses to consent, [. . .] or objects to the blood draw, as did Defendant in this case. Consent to a search must be voluntary." *State v. Halseth*, ___ Idaho ___, 339 P.3d 368 (2014) (citing *Schneckloth*, 412 U.S. at 232-33).

Because *Schneckloth* requires an analysis of the totality of the circumstances and *McNeely* rejects *per se* rules in favor of a totality of the circumstances test, the district court was incorrect in its conclusion that the blood draw in this case was constitutional. In this case, a warrantless blood draw was performed after Mr. Eversole refused a breath test. (R., pp.170-71.) The State relied on implied consent, which is an unconstitutional *per se* exception to the warrant requirement. Pursuant to *Wulff* and *Halseth*, this is insufficient and the order denying the motion to suppress be reversed.

CONCLUSION

Mr. Eversole respectfully requests that this Court reverse the district court's orders denying his motion to suppress and motion to dismiss and remand this case for further proceedings.

DATED this 22nd day of January, 2015.



JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of January, 2015, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

BRANT LEE EVERSOLE
1005 BLAINE
IDAHO FALLS ID 83402

DARREN B SIMPSON
DISTRICT COURT JUDGE
E-MAILED BRIEF

JARED RICKS
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010

Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

JMC/eas